JUN-12-2003 Valence Technology, Inc.

Mr. John D. Graham Administrator Office of Information and Regular Office of Management and Budge Executive Office of the President Eisenhower Executive Office Buil 17th & Pennsylvania Ave., N.W. Washington DC, 20503

April 30, 2003

Dear Mr. Graham:

I am writing to request a meeting with you concerning two proposed rules amending hazardous material regulations for lithium ion batteries under development by the Department of Transportation's Research and Special Programs Administration.

I am the General Counsel of Valence Technology, Inc. Valence Technology is a small, U.S.-based lithium ion battery manufacturing company with facilities in Austin, Texas; Henderson, Nevada; and Mallusk, Northern Ireland and is among the dwindling number of U.S. companies in the rechargeable

battery field competing against the large Japanese and As an companies that dominate the field.

Currently, under the U.S. hazardous material against the field of the field o within this exception. (Our N-Charge Battery Pack has 12 grams of equivalent lithium content.) However, citing two fires involving certain types of primary lithium batteries at U.S. airports in 1999 and 2000, and the advantages of harmonizing international transportation regulations, in April 2002, RSPA proposed changes to these regulations that would bring the full burden of these regulations to bear upon our batteries.2 (See 67 Fed. Reg. 15510).

We strongly believe the N-Charge Battery Pack does not warrant a Class 9 designation. It has distinct safety advantages over primary lithium batteries and other lithium ion batteries and is the first lithium ion battery based upon phosphate technology designed to provide greater safety while providing a performance profile capable of powering the newest electronic devices.

If the changes proposed for the HMR go into effect, lithium ion batteries containing more than 8 grams of equivalent lithium content no longer will be excepted from regulation under 49 CFR § 173.185. As a

¹ Both of these fires concerned primary lithium batteries, not rechargeable lithium ion batteries.

2 (See 67 Fed. Reg. 15510). RSPA has not is a discrete fire of the conterning these proposals nor has it yet submitted a Paperwork Reduction.

Budget (OMB) concerning these changes.



result, for the first time, Valence's N-Charge Battery Pack would be required to be transported as a Class 9 hazardous material, which for Valence and its customers would be expensive and burdensome, would undercut in the marketplace the significant safety advantages these batteries provide, and, in our view, would not improve transportation safety.

On November 18, 2002 in anticipation of RSPA issuing a final lithium battery rule by the end of the year, Valence Technology submitted to RSPA a request for exemption from the U.S. HMRs to enable us to ship the N-Charge Battery Pack in accordance with stringent ackaging specifications rather than as a Class 9 hazardous material.

Subsequently, RSPA published in the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed claim and the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) and fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) and fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) and fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033) and fed. Reg. 72033) a notice of proposed rulemaking (NPRM) for the fed. Reg. 72033 and fed. Reg. Reg. 72033 and fed. Reg. 72033 a

The final rule for lithium batteries was not published in December, 2002, and we recently learned that it may not be published in the Federal Register for several months. In addition, the officials in RSPA's exemptions office were of the opinion that our exemption request was not "ripe for review."

Although these two proposed rules have not yet been published as final and the reduction of the Class 9 transportation exception level to 8 grams of equivalent lithium content is not effective for shipments within the United States, the ICAO guidelines have a provision similar to that in RSPA's proposed rules and the ICAO guidelines became effective on January 1, 2003. They apply to international transportation by air in some countries. As a result, depending upon the route our international air shipments take, our shipments could be, and have been, held up.

RSPA can solve the ICAO conflict by granting and improvement ICAO instructions as it is authorized to do. We have requested that the way are electronic ICAO until their HMR proposals become final, but they have not done so the second final that they will not do so.

We do not believe that there is a sufficient basis in the rulemaking record for either the April 2002 proposal or for the harmonization proposal to enable RSPA to change the current exception for lithium ion batteries containing less than 25 grams of equivalent lithium content such as Valence's N-Charge Battery Pack. Furthermore, we do not believe that either rulemaking record provides a sufficient basis for the regulation of rechargeable lithium ion batteries, such as Valence's N-Charge Battery Pack, as if rechargeable lithium ion batteries were primary lithium batteries. And, we do not believe that either rulemaking record provides a sufficient basis for the regulation of lithium ion batteries such as Valence's N-Charge Battery Pack because of safety concerns. In fact, we believe that lithium ion batteries such as Valence's N-Charge Battery Pack are just as safe, or safer, than certain primary lithium batteries that would continue to be excepted from regulation by RSPA's proposals.

Furthermore, RSPA makes several assertions in the preamble of the proposed harmonization rule and in the April 2002 proposed rule that we do not believe are correct. First, RSPA asserts that these proposed changes will not have a significant economic impact on a substantial number of small businesses and

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entities and, therefore, no analysis in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601-611, is required. We disagree. We are a small, U.S. based company with less than 100 employees and the changes RSPA has proposed will have a significant economic impact upon us and the marketplace in which we compete. We know that there are other small U.S. businesses that will be adversely affected by these proposed changes.

Second, RSPA asserts for both proposed rules that they will have only a modest increase in annual paperwork burden and cost. This statement is not correct, particularly for our customers who would be subjected to the full panoply of RSPA HMR requirements for the first time because of the proposed reduction of the exception level from 25 grams of equivalent lithium content to 8 grams. These include, but are not limited to, training employees to label, handle and ship hazardous materials, new PG II packaging for our products, seeking RSPA approved and additional fees for shipping hazardous materials. For Valence and other small by the seeking and additional fees for shipping hazardous materials and costly new requirements to be required to the particular to the particular description of the proposed reduction Act. They will also have significant down-stream effects of the particular to be particular to be added to be added to be added to be abled to be added to be a

Because the rulemaking records here involved do not set forth any basis for the regulation of lithium ion batteries such as Valence's N-Charge Pack, the collection of information to enforce these provisions is unnecessary and will have no practical utility within the meaning of the Paperwork Reduction Act because these batteries do not present safety problems in transportation or use.

Third, RSPA asserts that these proposed rules would not be a significant regulatory action under section 3(f) of Executive Order 12866 or under the Regulatory Policies and Procedures of the Department of Transportation (44 Fed. Reg. 11034). We believe that these proposed rulemakings are significant within the meaning of Executive Order 12866, and that they are inconsistent with the principles set forth in the Order and with the Regulatory Flexibility Act and the Paperwork Reduction Act.

We would very much appreciate the opportunity to meet with you and your staff concerning these matters. Because of the international air shipment uncertainty, we would appreciate a meeting as soon as practical.

Sincerely.

Roger A. Williams

Vice President Law & General Counsel

Cc: Mr. Donald R. Arbuckle

Deputy Administrator

Office of Information and Regulatory Affairs